Nos. 299 and 329.

IN THE

Supreme Court of the United States

OCTOBER TERM—1942.

No. 299.

JERSEY CENTRAL POWER & LIGHT COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 329.

NEW JERSEY POWER & LIGHT COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

BRIEF FOR THE STATE OF NEW JERSEY AS *AMICUS CURIAE.*

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BRIEF FOR THE STATE OF NEW JERSEY AS *AMICUS CURIAE*.

Foreword.

The State of New Jersey as *Amicus Curiae* respectfully submits this brief, complementary to the brief submitted by the petitioners, for the protection and preservation of the powers of the State to regulate electric utilities. The State adopts the detailed "Statement of Facts" made in petitioners' brief.

Except as clarification in the statement of the State's position requires, repetition of statements of fact and law contained in the brief of petitioners is herein avoided.

Jersey Central Power & Light Company is hereinafter referred to as "Jersey Central"; New Jersey Power & Light Company as "New Jersey Power"; Public Service Electric and Gas Company as "Public Service"; the Staten Island Gas & Electric Company as "Staten Island"; the Federal Power Act[1] as "Act" and the Federal Power Commission as "Commission".

Italics used in quoted material are not in the original and are supplied for emphasis.

The Issue Presented to This Court.

The Federal Power Commission by a determination made by it found that: "The acquisition of 341,350 shares of the common capital stock of Jersey Central Power & Light Company by New Jersey Power & Light Company was the acquisition by a public utility of the securities of another public utility within the meaning of Section 203 (a) of the Federal Power Act; that New Jersey Power & Light Company having acquired such securities without first having secured an order of the Commission authorizing it to do so, has acquired such securities in violation of the express provisions of Section 203 (a) of the Federal Power Act" (R. 940).

This determination by the Commission rested on the following finding: "The transmission facilities owned and operated by Jersey Central Power & Light Company ex-

[1] 49 Stat. 847, 16 U. S. C. A. § 791a.

tending from its substation adjacent to its generating plant in South Amboy, New Jersey, to the south bank of the Raritan River in said State are transmission facilities utilized for the transmission of electric energy in interstate commerce, and therefore Jersey Central Power & Light Company is a 'public utility' within the meaning of the Federal Power Act" (R. 939-940).

The court below on petitions to review this determination, affirmed the determination (R. 1135).

The State of New Jersey submits that the court below in so affirming the determination of the Commission erred and that Jersey Central is not a public utility within the meaning of Section 201 (e) or of Section 203 (a) of the Act[2] and that the acquiring of the 341,350 shares of the common stock of Jersey Central by New Jersey Power without first having secured an order of Federal Power Commission authorizing it to do so, was not a violation of Section 203 (a) of the Act.

The issue submitted is not as to the extent of the constitutional power of Congress in regulation of interstate commerce. The issue submitted is solely as to the extent to which Congress exerted such power in enacting the Federal Power Act.

The Statute.

The provisions of the Act defining the term "public utility" and the jurisdiction of the Federal Power Commission are as follows:[3]

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[2] 49 Stat. 848, 849, 16 U. S. C. A. §§ 824(e), 824b(a).
[3] 49 Stat. 847, 16 U. S. C. A. § 824.

"Section 201 (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

"(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

"(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

"(d) The term 'sale of electric energy at wholesale' when used in this Part means a sale of electric energy to any person for resale.

"(e) The term 'public utility' when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part."

The Facts.

The State for the purposes of this brief has as before noted, adopted the "Statement of Case" made in the brief of the petitioners.

However, the Court's attention is nevertheless specifically directed to the following facts.

Jersey Central is a corporation organized and operating in the State of New Jersey in generating, transmitting and distributing electric energy to the public.

New Jersey Power is likewise a corporation so organized and operating in the State of New Jersey.

Public Service is also a corporation so organized and operating in the State of New Jersey.

Staten Island is a corporation organized and so operating in the State of New York.

It is admitted for the purpose of this argument that New Jersey Power, Public Service and Staten Island each is a "public utility" within the meaning of the Act.

The State of New Jersey submits that Jersey Central is not a "public utility" within such Act.

The lines and franchise area of Jersey Central are confined to the State of New Jersey. Neither its lines nor its franchise area extend to the border of another state (R. 296). All of its customers are in New Jersey (R. 274). It is in no wise affiliated with either Public Service or Staten Island.

Jersey Central has no contractual relation with Staten Island. Its facilities are not connected with those of Staten Island.

Jersey Central owns and operates a generating plant for the production of electricity at South Amboy, in New Jersey (R. 273). A transmission line seven-eighths of a mile in length runs from its South Amboy generating plant to metering equipment on the south bank of the Raritan River in New Jersey, at which point Jersey Central has a connection with Public Service. At irregular intervals Jersey Central, under separate, non-obligatory arrangements, sells and delivers energy to Public Service at this point of interconnection in New Jersey, and at this point in New Jersey, Public Service receives such energy and conducts it in its own lines under the Raritan River to its Mechanic Street Station at Perth Amboy, New Jersey (R. 286).

The facilities beyond this point of connection on the south bank of the Raritan River in New Jersey are neither owned nor operated by, nor are they subject in any wise to the control of, Jersey Central. The energy originated by Jersey Central in New Jersey and delivered by Jersey Central to Public Service at the south bank of the Raritan River in New Jersey, through the connection at that point, is not in any wise subject to the control of Jersey Central after such delivery (R. 290).

The physical conditions at the bus bar at the Public Service substation at Mechanic Street in Perth Amboy, New Jersey, a distribution center in its electric system, are described in detail in petitioners' brief (p. 10).

Jersey Central has, as above indicated, a verbal understanding with Public Service, terminable at will (R. 285), under which at irregular intervals Jersey Central sells energy to Public Service at the above described interconnection in New Jersey. Jersey Central sells no energy to Staten Island. It has no contractual relations, formal or informal, with Staten Island (R. 285, 292-3, 332, 453-4). There are no commercial relations between Staten Island and Jersey Central.

However, Staten Island has a line connected to a submarine cable which runs under the Arthur Kill, a body of water separating New Jersey from New York (R. 348). At midchannel, the cable is connected to a Public Service line which line leads into Mechanic Street substation of Public Service at Perth Amboy, New Jersey.

Through this connection between the facilities of Public Service and Staten Island emergency and economy flow energy passed between Public Service and Staten Island.

The evidence below clearly established that neither by design nor intent of either Jersey Central, Public Service or Staten Island was energy originating with Jersey Central transmitted to Staten Island. On the contrary it clearly showed that there were seven substations of the Public Service other than the Mechanic Street Station through which emergency and economy power might be and was furnished by Public Service to Staten Island (R. 103, 454).

By observation and measurement conducted on the property of Public Service and of Staten Island, and the reading and study of "logs" and by mathematical calculations (none of which Jersey Central could have made, since it had no right of entry upon the property of, or access to the records of either), the Commission found that there were *moments of time* when energy generated by Jersey Central escaped to Staten Island from Public Service lines. This energy could only have been slop-over energy, escaping while Public Service and Staten Island were endeavoring to keep their interconnections in balance and thereby prevent *any* flow.

"Slop-over energy" the court below finds to be an *"electric phenomenon* which consists in an *instantaneous, involuntary* ebb and flow where there is a physical connection, otherwise unused between two systems. Where such an unused connection exists the two systems are normally 'in balance'. When there is a sudden demand for more energy made on one of the systems, its generators are speeded up to meet the demand. There is a tendency, however, for the system on which the immediate demand is made, to draw on the one system with which it is connected for the *instantaneous* period between the demand and the compensating generating speed up" (R. 1118).

Summary of Argument.

I. Jersey Central is not a "public utility" within the meaning of that term as used in the Federal Power Act.

(a) The background of the Act in the decisions of this Court indicates that the prior law contained a "gap" in

that part of the business of selling and transmitting electric energy which consisted of a direct sale or transmission across a state line. The states regulate certain aspects of this transaction but the situation involved in the *Attleboro* case[3a] could not be so regulated.

(b) The Act, when read and construed in the light of its legislative background and history, should be applied only to cases where Federal regulation was necessary in order to close the gap which State regulation could not affect. The legislative history of the Act demonstrates that this was the sole purpose for its enactment.

(c) The Act should be read, construed and applied in the light of the fact that, construed as it was by the court below, it vests in a Federal Commission pervasive control over myriads of local businesses in matters heretofore left to local control and that such construction of such far-reaching import can only rest on a clear manifestation of congressional intent. The clearly manifested intent of Congress was not to delegate to the Commission such broad powers. The contrary construction by the court below demonstrates the error of that court's judgment.

(d) The Act should be construed, appraised and applied in the light of the rule of statutory construction under which congressional intention to displace local laws in the exercise of the commerce powers is not to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose. Such considerations in the case of the Federal Power Act demonstrate that Congress did not intend to displace local laws or regulations.

[3a] 273 U. S. 83.

(e) The Act should be read, construed and applied in the light of the fact that when Congress has enacted legislation intended to exert its power under the commerce clause to the full and to extend such power to matters local in nature but affecting interstate commerce, Congress has used clear and explicit language to indicate such intent. In the Federal Power Act, Congress, by clear and explicit language, indicated that it did not intend to exert such far-reaching power.

(f) The words of the Act unaided by any rules of statutory construction make clear the intent of Congress to limit the jurisdiction of the Commission to transactions and activities in, and facilities for, interstate commerce in the narrow and literal sense of the words "in" and "for" interstate commerce.

(g) Jersey Central has no facilities for transmission of electric energy from a state and is not a "public utility" within the meaning of the Act and neither it, its business nor facilities are subject to the jurisdiction of the Commission. Congress did not intend that the mere interconnection of local facilities with facilities of other independent persons having an interstate character should subject the first mentioned facilities to the jurisdiction of the Commission. Nor did Congress intend that facilities should be subject to the jurisdiction of the Commission where such facilities were not intended to be used by the owner or operator thereof for interstate purposes.

(h) Congress did not intend that dual control by the State and Federal Government should be the commonplace type of regulation. Congress intended that the regulatory powers of the states should be completely preserved without

limitation by the Federal regulatory body. Dual control, where necessary, was expressly provided for. It is not necessary and was not provided for with respect to the facilities of Jersey Central.

II. If it be determined that Jersey Central is a "public utility" within the meaning of the Act, nevertheless, the transaction here in question is not within the jurisdiction of the Commission. The transaction is one subject to regulation by the State and the State has legislatively and administratively acted in regulation thereof.

ARGUMENT.

POINT I.

Jersey Central is not a "public utility" within the meaning of that term in the Federal Power Act.

(a)

The background of the Federal Power Act in the decisions of this Court.

The Act should be read, construed and applied in the light of the background of the judicial decisions marking off interstate commerce from intrastate commerce, and which disclosed a field of legislative regulation which the States could not reach and in which Congress had not legislated.

This background was provided in particular by the following decisions of this Court.

In *Public Utilities Commission of Kansas* v. *Kansas Natural Gas Co.*, 249 U. S. 236 (1919), the Kansas Natural

Gas Company was engaged in producing natural gas in Oklahoma and Kansas and in making sale thereof and transporting the same to local distributing companies in Kansas and Missouri. Under the contracts with these local distributing companies the pipe line company received a proportion of the gross revenues collected by the local companies from their customers.

Receivers of the Kansas Company petitioned the Kansas and Missouri Commissions for increases in the rates charged by the local distributing companies. The full amount of the desired increases was denied. Suit was then brought alleging that the State Commissions had imposed rates unduly burdening interstate commerce and that they were confiscatory.

It was unquestioned that the business of the Kansas Company—the transporting of natural gas and sale thereof to local distributing companies as above described—was interstate commerce.

The court below found that the rates established by the State Commissions imposed a burden on interstate commerce.

This court though accepting the conclusion that the business of the Kansas Company was interstate commerce—held that the sale of gas by the local distributing companies to their own consumers was not interstate commerce and that the State regulation of these local distributing companies was not subject to attack as burdening interstate commerce.

In *Pennsylvania Gas Company* v. *Public Service Commission of New York*, 252 U. S. 23 (1920) the Pennsylvania

Gas Company engaged in transmitting natural gas from Pennsylvania into New York, where it rendered a local utility service to consumers in certain New York municipalities including Jamestown. The Public Service Commission of New York undertook to regulate the local gas rates in Jamestown. The Pennsylvania Company resisted, contending that its business was interstate and not subject to state control.

Though there the transmission was a single and continuous movement from the source of supply in Pennsylvania to the consumers located in New York, and though this court held that the entire movement was interstate commerce, this court nevertheless held that the matters regulated were fundamentally local in nature and appropriate objects of concern and regulation by the State in the absence of federal regulation.

In *Missouri* v. *Kansas Natural Gas Co.*, 265 U. S. 298 (1925) the Kansas Company having failed, as above indicated, in its effort to obtain added revenue through increase in rates for gas charged by it to local distributing companies, endeavored to increase its earnings directly by increasing its wholesale price to the local distributing companies. It endeavored to effect such increase in Missouri without the consent of the Public Service Commission of that State and in Kansas notwithstanding the adverse action of the Commission of that State. The issue involved concerned the right of the States to control the wholesale price at which an interstate pipe line company furnished gas to local distributing companies. The claim of the States to the right to regulate the wholesale rates was predicated on the proposition that the business was essential to the

operation of the local public utilities; that since Congress had not acted and if the States did not act, the business would be wholly unregulated and that in the absence of action by Congress, it was within the competency of the States to regulate the wholesale prices.

This court found that the sale and delivery of the gas to the local distributing companies was a part of the interstate movement; that an aspect of interstate commerce essentially local, rather than national, in character was not involved, and that the States consequently were without power to regulate even in the absence of Congressional action.

This court said: "It is as though the [State] commission stood at the state line and imposed its regulations upon the final step in the process at the moment the interstate commodity entered the state, and before it had become part of the general mass of property therein."

Finally in 1927 in *Public Utility Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83, a situation essentially similar to the situation involved in the *Pennsylvania Gas Company* case, *supra*, came before this court.

In the *Attleboro* case, the Narragansett Electric Lighting Company engaged in chief in supplying electricity at retail in Providence, Rhode Island had entered into a twenty year contract with the Attleboro Company, a Massachusetts corporation, to supply all of the Attlehoro company's electric requirements at a basic rate, delivery to be made at the State line.

The Rhode Island Commission found the contract rate to be unreasonably low, interfering with the Narragansett Company's full performance of its duty to other customers and ordered a new schedule which it found would yield only a reasonable return.

The Supreme Court of Rhode Island reversed the State Commission's order.

This court, affirming, held that the sale was a transaction in interstate commerce and that the regulation of the wholesale rate fixed thereby was not within the constitutional capacity of Rhode Island, though Congress had not acted to occupy this field of regulation.

It followed that the State of origin was in no better position than the State of destination to regulate the wholesale rates for energy in interstate commerce.

Here then was a gap in regulation—the State had no constitutional capacity to act, and Congress had not acted.

It was the gap disclosed by these decisions that Congress sought to close.

It is submitted that it was the intent of Congress, in enacting the Act here considered, legislatively to draw the line marking off interstate commerce from intrastate commerce where this court in this line of decisions had drawn it and to close the gap in regulation which was thereby revealed—a gap caused by the constitutional incapacity of the States to act and the failure of the Congress to act.

(b)

The Act should be read and construed and applied in the light of its legislative background and history.

The brief of the petitioners (pp. 42-55) sets out the legislative history of the Act comprehensively. Repetition here would not be justified.

The court's attention is directed to the fact that while the framers of the bill as originally introduced designed to give the Act, in the regulatory jurisdiction that it conferred, the widest scope possible under the Constitution except as to rates, there is clearly manifested in every stage of the legislative progress of the bill, the intent of Congress on the contrary to do no more than close the gap in regulation disclosed by the line of cases set out above under (a).

As confirming the State's claim of such Congressional intent attention is directed to the fact that the bill as originally drawn provided in Section 201 (a):

> "The provisions of this title shall apply to the transmission and sale of electric energy in interstate commerce and to the *production* of energy for such transmission and sale, but shall not apply to the retail sale of energy in local disfribution. The Commission shall have jurisdiction over all facilities for such transmission, sale, and *or production of energy by any means and over all facilities connected therewith as parts of a system of power transmission situated in more than one State* • • • (S. 1725, 74th Cong. 1st Sess., February 6, 1935).

The evidence afforded of the difference in intention between the framers of the bill as originally introduced, and

that of Congress in enacting the Act, by the contrast between Section 201 (a) of the bill as originally introduced and Section 201 as enacted, is so striking that, though it involves repetition, the paralleling provisions of Section 201 of the Act are here again set out:

> "(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State Commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a state line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter."

As Section 201 finally emerged in the Act "production" facilities and other facilities for transmission or sale "connected" with a system of power transmission as parts thereof situated in more than one State were excluded from the facilities subject to the Commission's jurisdiction.

The decision in the court below in effect restores these facilities to the jurisdiction of the Commission, as will be hereinafter shown.

Section 201 of the original bill (H. R. 5423) provided "The provisions of this title shall apply to the transmis-

sion and sale of electric energy in interstate commerce and to the production of energy for such transmission and sale, except where such electric energy is sold for use within the State in which it is generated."

As finally enacted Section 201 (a) provides that "* * * Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and that part of such business which consists of the transmission of electric energy in interstate commerce and the sale at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States."

Section 201 of the bill as originally introduced indicated on its face a purpose to exert to the utmost the constitutional power of Congress to regulate interstate commerce, including the regulation of matters merely relating to or affecting interstate commerce.

As enacted Section 201 clearly abandons this apparent purpose and puts such abandonment beyond question by providing that the narrowed Federal regulation thereby exerted shall extend "only to those matters which are not subject to regulation by the States." The reference to Federal regulation in this section can only refer to the Federal regulation exerted by the Act.

Because of the background of the Act in the decisions of this Court and the legislative background and history of the Act, an application of the fundamental rule of statutory construction requiring that the old law, the mischief and the remedy be considered, is called for.

(c)

The Act should be read, construed and applied in the light of the fact that construed as it was by the court below, it vests in a federal commission pervasive control over myriads of local businesses in matters heretofore left to local control and that such construction of such far reaching import can only rest on a clear manifestation of Congressional intent.

Again, it should be noted that in the Act under consideration Congress explicitly declared that the Federal regulation thereby established should "extend only to those matters which are not subject to regulation by the States".

How pervasive the construction of the act by the court below is, is indicated by the Seventeenth Annual Report of the Commission (1937). According to that report *at least* sixty per cent of the total utility assets within the United States are "clearly" within the jurisdiction of the Commission. The annual report referred to asserts that of the "1,511 privately owned electric utilities with total claimed capital assets of approximately 17 billion dollars * * * 292 with total claimed capital assets of approximately 10 billion dollars clearly fall within the scope of" the Commission and that "an additional 261 of which, with the total claimed capital assets of approximately 3 billion dollars, have been classified as 'indeterminate' in the absence of more exact information as to their interstate character". (p. 10.)

Among other things, the construction of the Act contended for by the Commission and sustained by the court below has, under the guise of providing primarily for the

effective regulation of wholesale rates in interstate commerce, vested the Commission with power, according to the Commission, "clearly" to fix a rate base for more than sixty per cent of the operating assets (including assets for local generation and distribution) of the electric utility industry of the United States.

In *Interstate Commerce Commission* v. *Cincinnati, N. O. & Texas Pac. Rwy. Co.*, 167 U. S. 479, this court in holding that Congress has not conferred upon Interstate Commerce Commission power of prescribing rates, said (at p. 494):

> "The importance of the question cannot be overestimated. Billions of dollars are invested in railroad properties. Millions of passengers, as well as millions of tons of freight, are moved each year by the railroad companies, and this transportation is carried on by a multitude of corporations working in different parts of the country and subjected to varying and diverse conditions. • • •
>
> "The question debated, is whether it [Congress] vested in the Commission the power and the duty to fix rates; and the fact that this is a debatable question, and has been most strenuously and earnestly debated, is very persuasive that it did not. The grant of such a power is never to be implied. The power itself is so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions, the language by which the power is given had been so often used and was so familiar to the legislative mind and is capable of such definite and exact statement, that no just rule of construction would tolerate a grant of such power by mere implication."

In *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U. S. 349, this court said, (at pp. 354-5):

> "The construction of Section 5 [of the Fair Trade Act] urged by the Commission would thus give a federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local law. • • • An inroad upon local conditions and local standards of such far-reaching import as is involved here, ought to await a clearer mandate from Congress. • • • This case presents the narrow question of what Congress did, not what it could do. And we merely hold that to read 'unfair methods of competition in (interstate) commerce' as though it meant 'unfair methods of competition in any way affecting interstate commerce', requires, in view of all relevant considerations, much clearer manifestation of intention than Congress has furnished."

The term "public utility" is defined by the Act to mean "any *person* who owns or operates facilities subject to the jurisdiction of the Commission."[4] The Act defines "person" as "an individual or a corporation."[5]

It follows, under the construction given by the court below, that if a corporation, engaged in manufacture and sale of its products exclusively in New Jersey, generated energy for such manufacture, sold and transmitted its surplus energy to Public Service as Jersey Central does in the instant case and in equally insignificant amounts and if energy generated by it found its way as slop-over, as here, to the lines of Staten Island, this local manufacturing

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[4] Sec. 201(e), 49 Stat. 848, 16 U. S. C. A. § 824(e).
[5] Sec. 3(4), 41 Stat. 1063, 16 U. S. C. A. § 796(4).

company, owning and operating facilities which, under the construction of the court below, being facilities for transmission of electric energy in interstate commerce, would fall within the jurisdiction of the Commission and would, as to exercise of its corporate powers as to issuance of its securities, merger and consolidation, sale or other disposition of its property, choice of directors and officers, etc., be subject to the regulatory power of the Commission.

So, too, it follows under the construction given by the court below that no sale or transmission of electric energy can be made in intrastate commerce, (and that every sale or transmission is in interstate commerce) if the vendee or receiver, or any person into whose control any such energy shall subsequently come, no matter how remote in the chain from the original seller or transmitter, so uses the same as to permit any part thereof to flow across a state line, even though such flow is only the momentary, instantaneous flow caused by the phenomenon of slop-over.

The wide reach of the Act as construed by the court below reinforces the argument that such construction was not intended by Congress.

(d)

The Act should be construed, appraised and applied in the light of the rule of statutory construction under which Congressional intention to displace local laws in the exercise of the commerce power is not to be inferred unless clearly indicated by these considerations which are persuasive of the statutory purpose.

This rule of construction is so firmly settled that extended citation of authority is not justified.

In the *Minnesota Rate Cases*, 230 U. S. 352, this court in holding that in prescribing intrastate rates the State exercised authority appropriate to its territorial jurisdiction and not "opposed to any action thus far taken by Congress", said: "* * * it is for Congress to determine within the limits of its constitutional authority over interstate commerce and its instruments the measure of the regulation it should supply. It is the function of this court to interpret and apply the law already enacted, but not under the guise of construction to provide a more comprehensive scheme of regulation than Congress has decided upon. Nor in the absence of Federal action, may we deny effect to the laws of a State enacted within the field which it is entitled to occupy until its authority is limited through the exertion by Congress of its paramount constitutional power."

In *Illinois Central R. Co.* v. *Public Utility Comm.*, 245 U. S. 493 this court said: "In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intended to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, *unless and except so far as, its purpose to do so is clearly manifested.*"

(c)

The Act should be read, construed and applied in the light of the fact that when Congress has enacted legislation intended to exert its power under the commerce clause to the full and extend such power to matters local in nature but "affecting" interstate commerce, Congress has used clear and explicit language to indicate such intent.

In *Kirschbaum* v. *Walling*, 316 U. S. 517, this court said (at p. 522): "The history of Congressional legislation regu-

lating not only interstate commerce as such but also activities intertwined with it, justifies the generalization that, when the federal government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation."

In addition to such Acts of Congress referred to in petitioners' brief (pp. 40, 41) the following Acts are brought to the attention of the court.

The Anti-Racketeering Act[6] extends explicitly to "*any person who in connection with or in relation to any act in any way or degree affecting trade or commerce or in any article or commodity moving or about to move in commerce*" does the acts prohibited.

To make manifest its intent beyond all doubt, Congress in that statute defined the term "trade or commerce" to mean trade or commerce between any States "*and all other trade or commerce over which the United States has constitutional jurisdiction*".

The Grain Future Act after defining interstate commence generally, proceeded to provide[7]:

> "(b) For the purposes of this act (but not in anywise limiting the foregoing definition of interstate commerce) a transaction in respect to any article

[6] 48 Stat. 979, 18 U. S. C. A. § 420a.
[7] 42 Stat. 998, amended by 49 Stat. 1491, 7 U. S. C. A. § 3.

shall be considered to be in interstate commerce if such article is part of that *current* of commerce usual in the grain trade whereby grain and grain products and by-products thereof are sent from one state with the expectation that they will end their transit, after purchase, in another, including in addition to cases within the above general description, all cases where purchase or sale is either for shipment to another state, or for manufacture within the state and the shipment outside the state of the products resulting from such manufacture. Articles normally in such *current* of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this act. * * *"

The Interstate Commerce Act[8] conferring power over intrastate rates affecting interstate commerce now provides:

"Sec. 13, par. (4) *Duty of commission where State regulations result in discrimination.* Whenever in any such investigation the commission, after full hearing, finds that any such rate, fare, charge classification, regulation, or practice causes any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce, which is forbidden and declared to be unlawful it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation or practice there-

[8] 24 Stat. 379, as amended, 49 U. S. C. A. § 1.

after to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, *the law of any State or the decision or order of any State authority to the contrary notwithstanding.*"

In the National Labor Relations Act[9], Congress not merely defined "commerce" as meaning "trade, traffic, transportation or communication among the several states," but defined as well the term "affecting commerce" as meaning *in* commerce, or burdening or obstructing commerce, or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce".[10]

(f)

The words of the Act unaided by any rules of statutory construction make clear the intent of Congress to limit the jurisdiction of the Commission to transactions and activities in, and facilities for, interstate commerce in the narrow and literal sense of the words "in" and "for" interstate commerce.

The act applies to "facilities for the transmission of electric energy *in* interstate commerce and to the sale of electric energy at wholesale *in* interstate commerce".

The Commission is given "jurisdiction over all facilities for *such* transmission or sale of electric energy". The facilities over which jurisdiction is so given are expressly

[9] 49 Stat. 449, 29 U. S. C. A. § 151.
[10] 49 Stat. 451, 29 U. S. C. A. § 152(7).

limited to facilities *for* transmission, or sale at wholesale, of electric energy *in* interstate commerce.

The Act declares that electric energy shall "be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof * * *" and declares that "sale of electric energy at wholesale" means a sale of electric energy to any person for resale."

The Act defines "public utility" as meaning "any person who owns or operates facilities subject to the jurisdiction of the Commission."

The court below (correctly, it is submitted) found that it was "beyond dispute that Jersey Central itself sells no electricity directly in interstate commerce." Jurisdiction of the Commission over Jersey Central must therefore depend upon whether that company owns and operates facilities for transmission of electric energy *in* interstate commerce within the meaning of the Act.

The words of the Act indicate the intent of Congress to limit the jurisdiction of the Commission to wholesale sales, activities and facilities for transmission in interstate commerce and not to extend such jurisdiction to sales, activities and facilities merely connected or intertwined with, or related to or "affecting", interstate commerce.

The Act expressly provides that it shall apply to the sale of electric energy at *wholesale in interstate commerce*, *"but shall not apply to any other sale of electric energy."*

That intent is also indicated by the provision of the Act that the jurisdiction of the Commission shall not extend except as specifically provided "over facilities used for the generation of electric energy or over facilities used in local

distribution or only for the transmission of electric energy in intrastate commerce or over facilities for the transmission of electric energy consumed wholly by the transmitter."

That intent is further indicated by the declaration of the Act that Federal regulation "of that part of" the business of transmitting and selling electricity for ultimate distribution to the consumer "which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest."

The provisions of the Act above set out would seem to leave little room for doubt that Congress intended to confine the jurisdiction conferred on the Commission to sales, activities in, and transmission facilities for, interstate commerce and not to extend it to sales, activities or facilities merely connected or intertwined with, related to or affecting, interstate commerce. In fact, by Section 201 (b) Congress stated that the Commission "shall not have jurisdiction * * * over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce * * * *."

Finally to leave no room for doubt as to its intention Congress in the Act declared: "Such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States."

Irrespective of what other scope or effect this provision may have, it is completely persuasive of the intent of Congress to so limit the jurisdiction conferred to sales, activities *in*, and facilities *for* interstate commerce.

If the words of the Act in themselves leave any room for doubt that the intent of Congress was to limit the jurisdiction conferred on the Commission as above argued, such doubt is completely set at rest through a reading of the words of the Act in the light of its legislative history; its background in the adjudications of this court, and the settled rules of statutory construction.

(g)

Jersey Central has no facilities for transmission of electric energy from a State and is not a "public utility" within the meaning of the Act and neither it, its business nor facilities are subject to the jurisdiction of the Commission.

The business of the Jersey Central is wholly made up of intrastate transactions and activities.

No part of its business consists of transmission of electric energy in interstate commerce within the meaning of the Act. Nor does it own or operate facilities for transmission of such energy in interstate commerce, within the meaning of the Act.

Jersey Central is organized under the laws of the State of New Jersey. It generates electric energy in New Jersey; its lines and its franchise area are wholly within that State and do not extend to the border of another State; all of its customers are in that State; and it neither sells nor destines any electricity outside that State.

The mere physical connection *within New Jersey* of a line of Jersey Central with a line of Public Service does not constitute the connecting line of Jersey Central a facility for interstate commerce even though Public Service, prin-

cipally engaged in transmission and distribution intrastate in New Jersey, is also engaged in transmission interstate.

As noted under Point I, (b) above (at p. 16) the bill as introduced extended to the "*production*" of electric energy for transmission and sale in interstate commerce. This provision did not find its way into the Act. As introduced the bill extended to all *facilities* for the "production" of energy for transmission in interstate commerce. This provision also did not find its way into the Act as enacted.

As introduced the bill applied to all facilities "*connected*" with facilities for the transmission, sale and/or production of energy in or for interstate commerce as parts of a system of power transmission situated in more than one State. This provision too did not find its way into the act.

It would seem clear, then, that mere physical connection of the facilities of one company with the facilities of another company will not, under the Act, alone constitute the first company a public utility within the Act, although the second company is a public utility within the Act. In effect the decision below reads anew into the Act these provisions which Congress so rejected.

The court below found that Jersey Central did not sell at wholesale in interstate commerce (R. 1128). Sale involves transmission and delivery. If the sales and deliveries as part of such sales did not constitute sales in interstate commerce it is difficult to see how the facilities through which such sales are executed in transmission and delivery within the State of New Jersey can be said to be facilities for interstate commerce and such transmission and delivery be said to constitute transmission in interstate commerce.

The clear purpose of the Act was to limit the jurisdiction of the Commission to transmission in interstate commerce; the facilities for such transmission and transactions and activities of the transmitter.

Jersey Central does not transmit in interstate commerce. Transmission in interstate commerce involves a designed, intended activity in interstate commerce. Ownership or operation of facilities for such transmission involves ownership or operation of facilities for the purpose of transmission in interstate commerce.

Analysis of the provisions of Section 201, relating to the definitions of "public utility" and "transmission of electric energy in interstate commerce" and the description of "facilities subject to the jurisdiction of the Commission", in effect reduces the question here to be decided to the simple one of whether this seven-eighths mile line is a facility "for transmission from a state". The State of New Jersey submits that it is not. The word "for" implies design or intent. The word "transmission" implies an affirmative act of sending across. The words "from a state" imply the requirement of an intended destination.

This facility is only "for" transmission within the state, from Jersey Central at South Amboy to Public Service. The "transmission" is a sending to Public Service and no further. Any energy generated by Jersey Central which was found in Staten Island was slop-over, it was not "transmitted" from New Jersey by any one but momentarily escaped from the state despite attempts of Public Service and Staten Island to prevent it. In any event energy reaching Staten Island is not sent there by any affirmative act of Jersey Central. It could not be (R. 516).

Accordingly this facility is not one "for the transmission of electric energy" "from a state". Rather is it one "used * * * only for the transmission of electric energy in intrastate commerce" and hence expressly excluded from the jurisdiction of the Commission under subsection (b) of Section 201. It is a transaction wholly within the jurisdiction of the State of New Jersey and subject to regulation by that state.

Jersey Central engaged in no designed or intended activity in interstate commerce. It neither owns nor operates facilities for the purpose of any designed or intended activity in interstate commerce.

If any energy generated in Jersey Central reached New York it did so undesigned by and unknown to Jersey Central and through a mere electric phenomenon, and by means of and over facilities neither owned nor operated or in any way under the control of Jersey Central.

In this connection what this court said in the following cases has point.

In *McCluskey* v. *Maryville & N. R. Co.*, 243 U. S. 36, this court said:

> "The defendant Mill Company simply carried over its own road, on its own cars, its own goods to a market where it sold and delivered them. It had no concern with the subsequent disposition of them. It was under no obligation to deliver them to another carrier, and no other carrier was under obligation to deliver them, to receive them or to carry them further. The selling of the poles after the first sale by the Mill Company, or *whether they were going outside of the State,* depended upon chance or the

exigencies of the trade. The movement of the poles did not become interstate commerce until, *by the act of the purchasers thereof*, the poles were started on their way to their destination, in another State or country."

In *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390, this court said:

"But here the gasoline was in the hands of the purchaser to do with what he liked, and there was nothing that in any way committed it to sending the oil to Louisiana except its own wishes. If it had bought bait for fishing that it intended to do itself the purchase would not have been in interstate commerce because the fishing grounds were known by both parties to be beyond the State lines. A distinction has been taken between sales made with a view to a certain result, and those made simply with indifferent knowledge that the buyer contemplates that result."

The sweeping scope of the dual control by Nation and State which would result from the construction of the Act by the court below, and the confusion which would arise therefrom, in itself indicates that Congress did not intend to bring a company such as Jersey Central within the jurisdiction of the Commission and that Congress did not intend to make such dual control flow from a mere physical connection and an electric phenomenon, instantaneous and of momentary duration.

The court below finding that Jersey Central was a public utility within the meaning of the Act concluded that it was subject to the dual control of the Commission and the State Commission.

Laying the Act and the New Jersey Public Utility Act[10a] side by side it appears that if the construction of the Act by the court below prevails, Jersey Central will be subject in the exercise of all of its ordinary corporate powers to dual control, including, among other powers, the sale, lease and other disposition of its facilities; the issuance of its securities and obligations; the application of the proceeds of issuance of its securities to any unauthorized purpose or in excess of the amount allowed; the purchase, taking and acquiring of securities; the merger and consolidation of facilities and franchises; the capitalization of its franchises; adequacy and extensions of service; ascertainment of cost of and depreciation in property; annual depreciation rates; and its systems of accounts.

This, on the basis of a connection within the State of New Jersey between a line of the Jersey Central and one of Public Service (the latter a public utility within the meaning of the Act), "not designed or intended by either company as a facility for transmission of electric energy in interstate commerce" and the occurrence at infrequent intervals of an electric phenomenon, of mere momentary duration, designed and intended by no one, and constantly endeavored to be avoided by Public Service and Staten Island, resulting on such occasions in the momentary presence in the system of Staten Island, of energy generated by Jersey Central, slopping over from the lines of Public Service.

That such dual control was not intended by Congress in this situation here before this court is indicated by the declaration of the Act that the Federal regulation provided by the Act shall extend only to those matters which are not subject to regulation by the State.

[10a] Excerpts are compiled in Appendix A to Petitioners' Brief.

Matters involved in the ordinary corporate powers of a corporation of a State are "matters subject to regulation by the State".

In this case the State of New Jersey has since 1910, regulated these matters by legislation and by the functioning of an administrative agency with power of regulation.

If on these considerations it is concluded that Jersey Central is not a "public utility" within the meaning of the Act, then New Jersey Power in acquiring shares of common capital stock of Jersey Central did not acquire the securities of another "public utility" and in acquiring the securities of Jersey Central without having first secured an order of the Commission to do so, did not violate the provisions of the Act.

The Act requires the authorizing order of the Commission only for the acquiring by one "public utility" of the securities of another "public utility".

POINT II.

If it be determined that Jersey Central is a "public utility" within the Act, nevertheless the transaction here in question is not within the jurisdiction of the Commission. The transaction is one subject to regulation by the state and the state has legislatively and administratively acted in regulation thereof.

The Act provides (201 (a)) that Federal regulation as exerted by the Act shall extend "only to those matters which are not subject to regulation by the States."

The transfer of stock in Jersey Central, a New Jersey corporation, to New Jersey Power, another New Jersey corporation, is a "matter subject to regulation" by New Jersey.

The State of New Jersey has subjected such transfer to regulation through legislation. It has under such legislation subjected such transfer to administrative regulation by establishing an administrative commission to that end.

The administrative commission has subjected such transfer to regulation by approving the same upon certain conditions imposed for the protection of investors and consumers, after hearing on notice.

It is respectfully submitted that in consequence the "matter" is excluded from the jurisdiction of the Federal Commission.

The State adopts in support of this point the argument in Points II and III of petitioners' brief.

The State additionally submits that the provisions of Sub-chapter I of the Act throw light upon the intent with which the words in Sub-chapter II considered under this Point were used. Sub-chapters I, II and III are integral parts of the Act.

Sub-chapter I sets up the Commission and relates to its power through issuance of licenses and otherwise to regulate the development of water power and resources.

Sub-chapter II relates to the regulation of Electric Public Utilities engaged in interstate commerce.

Sub-chapter III relates to both licenses under Sub-chapter I and public utilities under Sub-chapter III.

Sub-chapter I provides as to power produced under licenses:[11]

> "When said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscrimihatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful; *and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties,* or such States are unable to agree through their properly constituted authorities on the services to be rendered, or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties, jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall be allowed only for the bona fide purpose of financing and conducting the business of such licensee."

[11] 41 Stat. 1073, 16 U. S. C. A. § 813.

It also provides in the preceding section relating to Commission jurisdiction over rates, security, issues or service:[12]

> "That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter."

The intent of Congress to preserve the jurisdiction of the States as to matters subject to the jurisdiction of the States appears not alone from the declaration in Section 201 (a), "such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States", but it further appears from the explicit protection given to the States with respect to matters exclusively within the federal jurisdiction over the regulation of interstate transmission and fixing of rates for sales at wholesale in interstate commerce—through provisions for notice to the States[12a] and the setting up of joint boards.[13]

The construction of the Act contended for is not weakened by the fact that Sub-chapter II authorizes "joint hearings" with any State Commission as to matters subject to such State Commission and of the Commission. There are specific matters expressly subject to regulation by both the State Commissions and the Commission. See for illustration, the sections relating to rates of depreciation[14] and as to accounts.[15] Also note the effect of fixing

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[12] 41 Stat. 1073, 16 U. S. C. A. § 812.
[12a] 49 Stat. 847, 16 U. S. C. A. § 824a(a).
[13] 49 Stat. 853, 16 U. S. C. A. § 824h.
[14] 49 Stat. 855, 16 U. S. C. A. § 825a(a).
[15] 49 Stat. 854, 16 U. S. C. A. § 825(a).

interstate wholesale rates upon the fixing of local retail rates.

It is submitted that in this connection too, effect should be given to the rule of statutory construction which in case of any remaining doubt as to the intent of Congress resolves the doubt against intent to invade, displace or suspend the power of the States as to matters that in isolation are local.

The opinion below, in referring to the requisite approval of the transfer and acquisition of Jersey Central stock, held that Federal and State control under the Act was a dual control. It held that there was no conflict of jurisdiction and one could not be presumed. It is contended that the opinion below is legally erroneous in this position. Under the *Shreveport* case[16] the Federal authority is paramount. The court below said however the state could be paramount as to "matters which may affect" intrastate transmission while the Federal Commission was paramount as to "matters which may affect" interstate transmission (the opinion below did not discuss control of matters which might affect both types of transmission) (R. 1134). The State submits that under the Act control by one, of necessity, excludes control by the other (except where duel control is specifically sanctioned). However, the existence of Federal paramount authority which would oust the State of its jurisdiction in matters of stock transfers and acquisitions would also oust the State of its jurisdiction over the facilities used in the transmission of electric energy between Jersey Central and Public Service. This, as has been argued, would be a definite inroad upon the authority of the State over mat-

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[16] *Houston & E. W. Texas R. Co. v. United States*, 234 U. S. 342; see also *Florida v. United States*, 292 U. S. 1.

ters subject to regulation by the State of New Jersey. Unless the intent of Congress as expressed in the jurisdictional limitations of the Act is upheld as herein argued, the authority of the State over purely local utilities may ultimately reach the vanishing point.

Conclusion.

It is respectfully submitted that the judgments of the court below should be reversed in that (1) Jersey Central is not a "public utility" and is not subject to the Commission's regulatory power and (2) even if Jersey Central be a "public utility", no authorization of the Commission was required for the transaction here in question, since such transaction was "subject" to, and was legislatively and administratively subjected to regulation by that State.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

Nos. 299 and 329.—October Term, 1942.

Jersey Central Power & Light Company, Petitioner, 299 vs. Federal Power Commission. New Jersey Power & Light Company, Petitioner, 329 vs. Federal Power Commission.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[May 3, 1943.]

Mr. Justice Reed delivered the opinion of the Court.

These two cases bring here for review the construction of sections 201 and 203(a) of the Federal Power Act, as amended by the Public Utility Act of 1935.[1] These sections are included in Title II, Part II, of the latter act, which Part relates to federal regulation of the business of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale. By these sections, the public utilities subject to the Federal Power Commission are defined and the acquisition of securities of such utilities by any other utility subject to the act is forbidden without authorization of the Commission.

I. After the enactment of the above amendments to the Federal Power Act, and without seeking Commission authorization, the New Jersey Power & Light Company purchased from others than the issuer certain securities of the Jersey Central Power & Light Company. The Federal Power Commission, being of the opinion that both the purchaser and the issuer were public utilities within the definition of the Federal Power Act and that therefore the acquisition of the stock was illegal, on June 7, 1938, entered an order that the purchaser submit information concerning the acquisition of the stock and show cause why the Commission should not proceed to enforce the requirements of the act. To this order, the purchaser answered that the Jersey Central was not a public

[1] 49 Stat. 803, 847, 849, 16 U. S. C. §§ 824, 824(b).

utility within the definition of the act and that the approval by the Federal Power Commission to the acquisition was therefore not required by law. By permission of the Commission, the Jersey Central intervened and made the same contention as to its status. Thus there was presented for determination two questions: first, whether Jersey Central was a public utility under the act; and second, whether if it was a public utility, this acquisition of its stock was permissible in view of the declaration of section 201(a) that federal regulation should "extend only to those matters which are not subject to regulation by the States." This purchase is subject to regulation by New Jersey.

It is admitted that the purchaser, Jersey Power, is a public utility under the act. The Commission after investigation and hearing held that Jersey Central also was a public utility under the act. 30 P. U. R. (N. S.) 33. This holding was based on findings that Jersey Central owns and operates transmission facilities (an electric line) extending from its substation adjacent to its generating plant in South Amboy, New Jersey, to the south bank of the Raritan River in the same state where the line joins the transmission facilities of another company, not here involved, the Public Service Electric & Gas Company. This latter company transmits the energy from the point of junction on the Raritan to a common bus bar[2] in one of its substations, located also in New Jersey at Mechanic Street, Perth Amboy. From the bus bar, Public Service has transmission facilities extending to the mid-channel of Kill van Kull, a body of water between New Jersey and Staten Island, New York. At mid-channel, Staten Island Edison Corporation, another utility, connects with its transmission facilities which extend to its own Atlantic substation on Staten Island. The Commission further found, in the words quoted below, that energy generated in New Jersey by Jersey Central was consumed in New York and energy generated in New York was consumed in New Jersey.[3]

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[2] A bus conductor, or group of conductors, is a switchgear assembly which serves as a common connection for three or more circuits. *American Standard Definitions of Electric Terms*, published by American Institute of Electrical Engineers, p. 97.

[3] 30 P. U. R. (N. S.) 33, 36: "that the transmission facilities described provide a direct and interconnected line for the flow of electric energy between the substation of Jersey Central Power & Light Company located adjacent to its generating plant in South Amboy and Atlantic substation of Staten Island, Edison Corporation on Staten Island in the state of New York, via Mechanic

The evidence upon which these findings were based showed that the energy was delivered from Jersey Central to and from Public Service under contract and that Public Service likewise delivered and received energy under contract to and from Staten Island Edison. Jersey Central had no control over the destination of its energy after it made delivery to Public Service at the Raritan but it did, of course, control the distribution of energy received from Public Service. The deliveries from Jersey Central to Public Service were substantial, above fifty-five million kilowatt hours in each year of the period 1934 to 1937, inclusive. Those from Public Service to Staten Island were smaller for the same period, amounting to three to four million k. w. h. annually and the flow from Staten Island to Public Service aggregated about the same amount. Although, as will appear hereafter, the evidence shows some Jersey Central energy is consumed in New York, the amount is unknown.

The connection between Public Service and Staten Island is maintained primarily to guard the Staten Island distribution against breakdown. It is used for emergencies a few times per year on an average. Surplus energy is occasionally sold. The rest of the time the line is maintained "in balance." This is to avoid a delay of transmission in an emergency. If the connection were not maintained, an appreciable time would be lost in communicating and reestablishing the connection. Any oscillation of the balance, created by increased demand in New York or New Jersey, carries energy in one direction or in another to be consumed on one side or the other of the line between the states. This is called "slop-over" energy. These bulk deliveries were the subject of the sale agreements between Public Srvice and Staten Island.

Since the bus bar into which the Jersey Central energy is fed

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street substation, and electric energy was transmitted over such transmission facilities between such points via Mechanic street substation on numerous occasions during certain days and almost daily throughout 1936, 1937, and to September, 1938; that there is no evidence or testimony of any change in such operations during this period or subsequent thereto; that electric energy transmitted over facilities extending from the substation adjacent to the generating plant of Jersey Central Power & Light Company in South Amboy, New Jersey to Atlantic substation, on Staten Island, in the state of New York, via Mechanic street substation, is generated in the state of New Jersey and consumed in the state of New York; that electric energy transmitted from Atlantic Street substation to the substation of Jersey Central Power & Light Company in South Amboy, New Jersey, via Mechanic street substation, is generated in the state of New York and consumed in the state of New Jersey; . . ."

also receives large amounts of energy from other sources, the facts heretofore detailed do not prove conclusively that energy generated by Jersey Central passes to and is consumed in New York. This further evidence appears from testimony presented by investigators of the Commission. Their examination of Public Service records discloses that there were moments of time between January 26, 1937, and September 6, 1938, when all the energy flowing into the bus bar at Mechanic Street came from Jersey Central and at the same moments energy flowed from Mechanic Street in New Jersey to the Atlantic substation in New York. As no pools of energy exist from which the flow to New York could have been drawn, it necessarily follows that Jersey Central production was instantaneously transmitted to New York. Cf. *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165. The amount of energy transmitted was small. The evidence was developed from 184 log readings selected from 25,000. Of the 184 log readings, 12 showed this flow of energy from Jersey Central to New York between August 26, 1935, the effective date of the Federal Power Act, and March 14, 1938, the date of the present purchase of stock.[4] Twelve showed such flow shortly after the purchase.

[4] There is dispute as to whether the 184 instances selected for examination were typical. In view of the evidence just detailed as to the service arrangements between Jersey Central and Public Service, and Public Service and Staten Island Edison, this seems of no importance. There is no contention that the energy actually transmitted interstate shall be treated as accidental or that it falls under the de minimis rule. The method of selection is explained as follows:

"Q. . . . Then you have taken some 150 readings out of approximately 25,000 readings. Just why did you take these particular 150, Mr. Grimsley? A. At times when considerable power was going over from Jersey Central and for the same period it was going to Staten Island. That was necessary to make my determination. Now we might get 15,000, I don't know, to compare with those, but the point was to establish certain conditions at time of flow and at times when there was no energy flowing to Staten Island there was no point in taking those readings.

"Q. These are hand-picked readings where you worked toward a particular result and you selected those that would best show what you desired to establish? A. I was trying to get a condition when the energy was coming over from Jersey Central and flowing to Staten Island and over a period that might be considered typical.

"Q. Just a moment—A. (interposing) I don't know unless we go through all of them and compare them with these.

"Q. I suppose it would be pretty easy to pick out 150 other examples when power is flowing from Metuchen substation to Staten Island supplying the Mechanic street load, would it not? A. Oh, I think so, yes. Maybe more." [R. 266.]

The Commission's witness Grimsley spoke of 150 instances, but actual count discloses 184.

This evidence, we think, furnishes substantial basis[5] for the conclusion of the Commission that facilities of Jersey Central are utilized for the transmission of electric energy across state lines.

Petitions for rehearing were denied. An appeal was taken to the Circuit Court of Appeals under the provisions of section 313 of the act.[6] The determination of the Commission was affirmed, 129 F. 2d 183, and in view of the important questions of federal law raised by the petitions for certiorari, we granted review. — U. S. —.

The primary purpose of Title II, Part II, of the 1935 amendments to the Federal Power Act, *supra* note 1, was to give a federal agency power to regulate the sale of electric energy across state lines. Regulation of such sales had been denied to the States by *Public Utilities Commission* v. *Attleboro Steam & Electric Company*, 273 U. S. 83. On account of the development of interstate sales of electric energy, it was deemed desirable by Congress to enter this field of regulation.[7]

II. Petitioners concede that some energy generated by Jersey Central and sold and delivered by it to Public Service passes thereafter to New York. Their contention is that the arrangements by which this energy passes to New York does not make Jersey Central a public utility, within the definition of the act because it "does not own or operate facilities for the transmission of electric energy, or sale of electric energy at wholesale, in interstate com-

[5] "The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." Sec. 313(b), 49 Stat. 860, 16 U. S. C. § 825*l*(b).

[6] The order entered determined that Jersey Central Power & Light Company is a public utility and that the acquisition of its stock by New Jersey Power & Light Company was a violation of section 203(a) of the Federal Power Act. 30 P. U. R. (N. S.) 33, 36. This order fixed the status of Jersey Central as a utility amenable to the provisions of the Act: e. g., rates, sec. 205(a); ascertainment of cost of property, sec. 209(a); accounts, sec. 201. Rochester Telephone Corporation v. United States, 307 U. S. 125; Federal Power Commission v. Pacific Co., 307 U. S. 156; Columbia Broadcasting System v. United States, 316 U. S. 407.

[7] S. Rep. No. 621, 74th Cong., 1st Sess., p. 17:

"In recent years the growth of giant holding companies has been paralleled by the rapid development of the electric industry along lines that transcend State boundaries. To a great extent through the agency of the holding company, local operating units have been tied together into vast interstate systems. As a result the proportion of electric energy that crosses State lines has steadily increased. While in 1928, 10.7 percent of the power generated in the United States was transmitted across State lines, the percentage had increased by 1933 to 17.8. The amount of energy which flowed in interstate commerce in 1933 exceeded the entire amount generated in the country in 1913.

"The new part 2 of the Federal Water Power Act would constitute the first assertion of Federal jurisdiction over this major interstate public utility. The

"gap" created by decisions of this court, urged that the bill, as introduced, would overlap and break down state regulation and submitted amendments designed to avoid this result.[8]

The spokesman for the Association said of these proposed changes:[9] "We have, accordingly, sought to make it as clear as language will that Congress does not in this case intend to regulate anything except interstate power, sold at wholesale." With alterations of expression not affecting their sense, the proposed amendments of § 201(a) were embodied in the section as enacted.

I need not follow in detail the changes which were made in the bill in both branches of Congress. Suffice it is to say that they progressively emphasized the purpose to regulate only those matters which the states could not regulate.

In reporting the revised bill to the Senate, the Committee said:[10]

"Subsection (a) . . . . declares *the policy of Congress to extend that regulation to those matters which cannot be regulated by the States* and to assist the States in the exercise of their regulatory powers, but *not to impair or diminish the powers of any State commission.* (Italics supplied.)

"Subsection (b) defines the scope of this part of the act and the jurisdiction of the Commission. . . . This subsection leaves to the States the authority to fix local rates even in cases where the energy is brought in from another State. In *Pennsylvania Gas Co.* v. *Public Service Commission* (252 U. S. 23), the Supreme Court held that such rates may be regulated by the States in the absence of Federal legislation. The present bill carefully refrains from asserting Federal jurisdiction over these rates. The rate-making powers of the Commission are confined to those wholesale transactions which the Supreme Court held in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.* (273 U. S. 83), to be beyond the reach of the States."

Notwithstanding the statement in the Senate Committee's report on the Senate bill that "The revision has also removed every encroachment upon the authority of the States", the House, not satisfied that State power had been adequately protected, struck out the entire Senate bill by amendment and substituted a new draft. In presenting the amended bill to the House the Committee reported:[11]

"The new Parts (II and III) are designed to meet the situation which has been created by the recent rapid growth of electric

[8] Hearings, *supra*, pp. 1620, 1622.

[9] *Id.*, p. 1638.

[10] Senate Report No. 621, 74th Cong., 1st Sess., p. 48.

[11] House Report No. 1318, 74th Cong., 1st Sess., p. 7.

merce." "A person owning or operating facilities . . . . must own the facilities which transmit—send across—the energy, and this connotes voluntary, intentional action." From the asserted fact that Jersey Central has no control over the energy produced by it after its delivery to Public Service, petitioners conclude that this short transmission and sale, wholly in New Jersey, is an intrastate transaction. Without this separation from the movement across the New Jersey-New York line, the transmission by Jersey Central would fall within the definition of commerce declared by two former decisions of this Court.

In *Public Utilities Commission* v. *Attleboro Steam & Electric Company*, 273 U. S. 83, 86, this Court held in interstate commerce the sale of locally produced electric current at the state boundary with knowledge that the buyer would utilize the energy extrastate. The passage of custody and title at the line was held immaterial. We see no distinction between a sale at or before reaching the state line.

The other case is *Illinois Gas Co.* v. *Public Service Co.*, 314 U. S. 498. In this case, a wholly owned subsidiary bought gas in Illinois from its parent corporation. The parent had transported the gas across the state line and delivered it at a reduced pressure to the subsidiary in Illinois. The subsidiary transported the gas wholly intrastate and sold and, on again reducing pressure, delivered it to an Illinois distributing company. The intrastate movement by the subsidiary was held by us to be a part of interstate commerce. We said that the point at which title and custody passed, without arresting movement, did not affect the essential interstate movement of the business.

But we need not decide whether the intervention of Public Service between Jersey Central and Staten Island Edison and

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decision of the Supreme Court in Public Utilities Commission v. Attleboro Steam & E. Co. (273 U. S. 83) placed the interstate wholesale transactions of the electric utilities entirely beyond the reach of the States. Other features of this interstate utility business are equally immune from State control either legally or practically.

"The necessity for Federal leadership in securing planned coordination of the facilities of the industry which alone can produce an abundance of electricity at the lowest possible cost has been clearly revealed in the recent reports of the Federal Power Commission, the Mississippi Valley Committee, and the National Resources Board. Assertion of the power of the Federal Government in this direction becomes the more important at the time when the Federal Government is compelling the reorganization of holding companies along regional lines. The new part 2 of the Federal Water Power Act seeks to bring about the regional coordination of the operating facilities of the interstate utilities along the same lines within which the financial and managerial control is limited by title I of the bill."

the consequent loss of actual control of the energy by Jersey Central is significant to distinguish the two cases just cited. Petitioners, as we understand their briefs, concede, and rightly so, that power rests in Congress to regulate such a flow of energy from Jersey Central as here occurs. Such a flow affects commerce. Cf. *Wickard* v. *Filburn*, No. 59 this Term, decided November 9, 1942, and cases cited.[8] But petitioners say that Congress did not intend to exercise its full power over interstate transmission and directed only that transmission "in interstate commerce" should be regulated. As contrasted with "affecting commerce" in the Public Utility Holding Company Act of 1935, 49 Stat. 803, §1(c), or the "current of commerce" in the Commodity Exchange Act, 42 Stat. 998, or the broad language of The Bituminous Coal Act, 50 Stat. 83, or the Agricultural Adjustment Act, 50 Stat. 246, the words "in interstate commerce" are said, by petitioners, to be the "strictest test of jurisdiction available to Congress." But the argument, we think, gives no effect to the definition of "transmitted in interstate commerce" as used in this act. In the note below there is set out the pertinent provisions of section 201 which indicate the meaning given the phrase, which provisions are italicized for quick reference.[9] Subsections (a) and (b) show the intent to regulate such transactions as are beyond state power under the *Attleboro* case, *supra*. Subsection (c) defines the electric energy in commerce as that "transmitted

[8] Cf. Peoples Natural Gas Co. v. Federal Power Commission, 127 F. 2d 153, 157; Hartford Electric Light Co. v. Federal Power Com., 131 F. 2d 953, 958.

[9] The Federal Power Act of 1935, 49 Stat. 847:

"Section 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy *in interstate commerce* and the sale of such energy at wholesale *in interstate commerce* is necessary to the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

"(b) The provisions of this Part shall apply to the transmission of electric energy *in interstate commerce* and to the sale of electric energy at wholesale *in interstate commerce*, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for *such transmission* or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

from a State and consumed at any point outside thereof." There was no change in this definition in the various drafts of the bill. The definition was used to "lend precision to the scope of the bill."[10] It is impossible for us to conclude that this definition means less than it says and applies only to the energy at the instant it crosses the state line and so only to the facilities which cross the line and only to the company which owns the facilities which cross the line. The purpose of this act was primarily to regulate the rates and charges of the interstate energy. If intervening companies might purchase from producers in the state of production, free of federal control, cost would be fixed prior to the incidence of federal regulation and federal rate control would be substantially impaired, if not rendered futile.

Petitioners make the point, however, that this interpretation subjects connected facilities to the Commission's jurisdiction which facilities were deliberately eliminated by Congress. As an illustration they cite the provisions of section 201(a) as they appeared in a predecessor bill.[11] We do not think that the result which the petitioners apprehend follows from our interpretation. The language of section 201(a) and (b) indicates a distinction between the facilities for generation or production and those for transmission. Also, it is sales at wholesale only which are regulated and, finally, Commission power does not extend over all connecting transmitting facilities but only over those which transmit energy actually moving in interstate commerce. Mere connection determines nothing.

Further, we think the definition in subsection (e) of "public utility" covers Jersey Central, since that company owns and op-

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"(c) For the purpose of this Part, electric energy shall be held to be *transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof;* but only insofar as such transmission takes place within the United States.

"(e) The term 'public utility' when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part."

[10] S. Rep. No. 621, 74th Cong., 1st Sess., p. 49.

[11] S. 1725, 74th Cong., 1st Sess., February 6, 1935:

"The provisions of this title shall apply to the transmission and sale of electric energy in interstate commerce and to the production of energy for such transmission and sale, but shall not apply to the retail sale of energy in local distribution. The Commission shall have jurisdiction over all facilities for such transmission, sale, and/or production of energy by any means and over all facilities connected therewith as parts of a system of power transmission situated in more than one State. . . ."

erates the transmission line to the Raritan and that line, as a result of the interpretation of interstate commerce in the preceding paragraph, is a facility under Commission jurisdiction by the terms of subsection (b). Subsection (b) declares that the provisions of this part apply "to the transmission of electric energy at wholesale in interstate commerce." This subsection gives jurisdiction over facilities used for such transmission. The business of transmitting and selling electric energy is said to be affected with a public interest and federal regulation of a portion of that business is declared necessary. Section 201(a). The fact that a company is engaged in this business is not determinative of its inclusion in this act. The determinative fact is the ownership of facilities used in transmission. Such use makes the owner or operator of such facilities a public utility under the act (e). We conclude, therefore, that Jersey Central is a public utility under this Act. It is quite clear, however, from section 201 that although a company may be a public utility under subsection (e) all of its transactions do not thereby fall under the regulatory power of the Commission. In the next section of this opinion, we consider whether this purchase of stock is subject to Commission regulation.

III. Although only the facilities of a public utility used in the transmission or sale at wholesale of electric energy in interstate commerce or the rates and charges for such energy are subjected by Parts II and III of the act to regulation by the Federal Power Commission, that Commission has general power over the issue of all securities or assumption of all obligations by such a public utility.[12] This generality of control is in turn limited by an exception in the case of utilities organized and operating in a state where its security issues are regulated by a state commission.[13]

In the section of Part II in question here, however, which prohibits the purchase of the security of any other public utility, without authorization of the Commission, there is no exception of

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12 "Sec. 204. (a) No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser, surety, or otherwise in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability. . . ."

There is the same extent of control over records and accounts. Section 301(a).

13 Sec. 204. "(f) The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission."

any kind.[14] Consequently the action of Jersey Power, admittedly a public utility under Part II, in purchasing the stock of Jersey Central, hereinbefore held to be a public utility under the act, requires Commission approval, unless some other provision of law exempts the transaction from this control. Petitioners find this exemption in the concluding words of section 201(a), "such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States."[15] The Commission defies that this limitation is to be read into section 203(a). If the limitation is to be read as applying to section 203(a), the limitation exempts this transaction and the purchase here involved is beyond the reach of Commission power for the reason that the purchase could be and the transfer is regulated by the State of New Jersey.[16]

It will be observed that section 201(a) is a declaration of the end sought by the enactment of this Part, that is, federal regulation of the generation, transmission and sale of electric energy in commerce. The sounder conclusion, it seems to us, is that this limitation is directed at generation, transmission and sale rather than the corporate financial arrangements of the utilities engaged in such production and distribution. This conclusion finds strong support in the fact that not only section 203(a), here under discussion, but sections 204(a),[17] 208[18] and 301(a)[19] regulate matters obviously subject to state regulation. If the scope of the limita-

[14] "Sec. 203. (a) No public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so. . . ."

[15] See Note 9, *supra*.

[16] Section 19 of the Act of April 21, 1911, as amended. New Jersey Stat. Ann. 48:3-10.

[17] See Note 12, *supra*.

[18] "Sec. 208. (a) The Commission may investigate and ascertain the actual legitimate cost of the property of every public utility, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation, and the fair value of such property.

"(b) Every public utility upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction." 49 Stat. 853, 16 U. S. C. § 824(g).

[19] "Section 301. (a) Every licensee and public utility shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the

tion was as broad as petitioners contend, none of these sections just referred to would be effective. Section 203(a) would be a nullity as of course the disposition and acquisition of facilities, merger, consolidation or purchase of securities by their utilities may be regulated by the States. But this does not follow where a specific limitation is placed on the issue of securities by section 204. Section 204 is not rendered useless by subsection (f) since it is applicable to states without state commissions authorized to regulate security issues. See notes 12 and 13, *supra*. In view of the contemporaneous legislation as to holding companies (Title I, Public Utility Act of 1935, 49 Stat. 803) which left independent operating companies or subsidiaries of unregistered holding companies free to acquire securities in other operating companies,[20] it is difficult to conclude that by section 201(a) Congress limited the regulation of the acquisition of securities by section 203(a).[21]

The legislative history points to this result. When S. 2796, containing the progenitor of the disputed section, was reported by the Committee on Interstate Commerce of the Senate,[22] section 201(a) concluded:

"It is further declared to be the policy of Congress to extend Federal regulation to those matters which cannot be regulated by the States, and also to exert Federal authority to strengthen and assist the States in the exercise of their regulatory powers and not to impair or diminish the powers of any State commission."

The same bill had sections 208(a) and 301(a), just referred to, which did regulate matters which could be regulated by the states. After its passage through the Senate in this form, the bill went to the House and 201(a) was there amended by the Committee on Interstate and Foreign Commerce (H. Rep. No. 1318, 74th Cong., 1st Sess., June 24, 1935) to conclude, as it now does, "such

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Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this Act, including accounts, records, and memoranda of the generation, transmission, distribution, delivery, or sale of electric energy, the furnishing of services or facilities in connection therewith, and receipts and expenditures with respect to any of the foregoing: *Provided, however*, That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State. . . ." *Id.* 854, 16 U. S. C. § 825.

[20] Sec. 9(a) and (b), 49 Stat. 817.

[21] S. Rep. No. 621, 74th Cong., 1st Sess., p. 50, in referring to what is now § 203(a) said: "In this way the Commission would have authority to keep the same kind of check upon the creation of spheres of influence among operating companies that the Securities and Exchange Commission has over holding companies under title I."

[22] *Id.*

Federal regulation, however, to extend only to those matters which are not subject to regulation by the States." The report, although it commented on the section, did not mention this change as one of substance from the conclusion of the Senate bill. H. Rep. No. 1318, 74th Cong., 1st Sess., p. 26. Sections 208 and 301, with their regulation of matters subject to state regulation, remained unchanged. More significant even than these indicia of the scope of the concluding words of section 201(a) is the fact that the Committee which adopted the new concluding words, adopted also section 204, subsection (f), withdrawing federal regulation from security issues where such issues are "regulated by a State commission." While, of course, this may have been done to make certain that state power would not be infringed, such meticulous care was entirely unnecessary, if the wording of section 201(a), simultaneously added, had the effect now urged.[23] One might deduce from the language of the report in the House that the precise question at issue here was in the mind of the House Committee and was resolved in accord with our conclusion.[24] From this record of the pains taken by the Congress to make clear the respective responsibilities of federal and state authorities, we conclude that power was given the Federal Power Commission by section 203 to regulate the present transaction.

The judgment of the Circuit Court of Appeals is

Affirmed.

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[23] The language added to section 201(a) and section 204(f) is practically identical with the suggestions made by the National Association of Railroad and Utility Commissioners. Senate Hearings, Committee on Interstate Commerce, Public Utility Holding Company Act of 1935, p. 748-51.

[24] Public Utility Act of 1935, H. Rep. No. 1318, 74th Cong., 1st Sess., General Purpose of Title. "Part II gives control over security issues of interstate operating companies in cases where no State commission has control and over the consolidation, purchase, and sale of interstate operating properties." Page. 8.

Sectional Analysis of Bill:

"Section 203. Disposition of Property; Consolidations; Purchase of Securities

"Under the provisions of this section, approval must be secured for the sale, lease, or other disposition by a public utility of all of its facilities subject to the jurisdiction of the Commission, or any part of the facilities in excess of a value of $100,000, and for mergers or consolidations of such facilities or for the purchase by a public utility of the securities of any other public utility company. Commission approval of an acquisition, consolidation, or control would remove such transaction from the prohibitory provisions of any other law." Page 28.

Section 204:

"The requirement of subsection (f) of the Senate bill that applicable State laws must be complied with before Commission approval may be given, has been changed to authorize security issues without Federal approval where such issues are regulated by a State commission in which the public utility is organized and operating." Page 28.

SUPREME COURT OF THE UNITED STATES.

Nos. 299, 329.—October Term, 1942.

Jersey Central Power & Light Company, Petitioner,		
299	*vs.*	On Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.
Federal Power Commission.		
New Jersey Power & Light Company, Petitioner,		
329	*vs.*	
Federal Power Commission.		

[May 3, 1943.]

Mr. Justice Roberts.

The sole question is whether Jersey Central Power & Light Company is a public utility within the meaning of subchapter II of the Federal Power Act.

The company's business is the generation of electricity within New Jersey, and distribution of it in the State, principally by retail sale to the public. Its physical property is within New Jersey. It neither owns nor operates any facility which crosses a state line.

Jersey Central exchanges electric energy with another utility, Public Service. The physical hook-up by which this exchange is effected is such that Jersey Central at times transmits electricity to Public Service and at times receives electricity from Public Service. Jersey Central owns and operates a transmission line seven-eighths of a mile long extending from its power plant to another point in the State where the line connects to a cable owned by Public Service running to a station owned by the latter at Perth Amboy, New Jersey. Over these connecting facilities exchanges of two sorts are made. One is of emergency service whereby, in case of a break down in either company's system, energy is drawn from that of the other. The second is of economy flow energy, delivery of which takes place to either company when the other is able to generate at less cost than the receiving company could with its own facilities. The savings effected by the latter exchange are divided between the companies.

Any flow of electric energy from Jersey Central to Public Service is carried from the point of connection over Public Service cable to a so-called bus bar, a facility of Public Service located in New Jersey having a number of connections, one of which is with a transmission line connecting the Public Service system with that of Staten Island Edison in the State of New York. Over this line Public Service and Staten Island exchange from time to time emergency service. To accomplish this the lines of the two companies are always connected so that, whenever there is demand for additional energy by either company, the current flowing from the plant of the other supplies the deficiency until a speed up of the generators of the receiving company takes care of the load and stops the draught upon the energy supply of the other.

The lines of Jersey Central and Public Service are likewise always connected so that, in case of emergency, some of the energy generated by Jersey Central may pass over the lines of Public Service or vice versa. Thus energy generated by any of the three systems at times reaches that of one of the others in case of a deficiency of generation on the line of that other. This current, passing for short periods from time to time, due to an imbalance of potential between the interconnected systems, is called slop-over current.

Jersey Central has no contractual relations with Staten Island and does not sell it any energy. Jersey Central's relations with Public Service are independent of any contractual relations between the latter and Staten Island. At times when energy is flowing from Jersey Central to Public Service it is also flowing from Public Service to Staten Island and, in fact, at such times, some of the energy sold by Jersey Central to Public Service passes from Public Service to Staten Island under Public Service's contractual arrangements with Staten Island.

On the basis of these facts, the Commission held that Jersey Central owned and operated transmission facilities utilized for the transmission of electric energy in interstate commerce, and was, therefore, a public utility within the meaning of the Act, although the company sells no electricity directly in interstate commerce.

I am of opinion that the provisions of the Act require the contrary conclusion, and this reading of the statute is powerfully reinforced when the mischief intended to be remedied and the legislative history of the Act are considered.

There is no dispute concerning the exigency which moved Congress to adopt the statute. It had been settled that the transmission and sale of a commodity, such as electricity or gas, produced in one state, transported and furnished directly to consumers in another state, in interstate commerce, did not preclude regulation of the rates to the consumer by the state of delivery.[1] In 1927, however, this court held that where a company generated electric energy and transmitted it, under contract, to another public utility in an adjoining state, at the state line, whence the purchasing company transmitted and sold the energy to its consumers, the rate at which the first company sold to the second was not subject to regulation by the authorities of the state of origination.[2] The court stated: "The rate is therefore not subject to regulation by either of the two States in the guise of protection to their respective local interests; but, if such regulation is required it can only be attained by the exercise of the power vested in Congress." It is clear that the mischief to be remedied was the incompetence of the states to regulate rates for the sale by the producer of electricity at wholesale to be transmitted and delivered to an extra-state utility at or across a state line. This was the problem and the only problem which confronted the Congress. The legislation itself discloses that, in enacting Part II of the Act, Congress did not go beyond the needs of the situation.

Jersey Central's security issues are not subject to regulation under § 203 unless it is a public utility within the definition of the Act. To determine whether it is, we must turn to § 201. Subsection (e) defines a public utility as "any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part." We must look to other provisions of the section to ascertain what facilities are subject to the Commission's jurisdiction.

Subsection (a) reads: "It is hereby declared that the *business* of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part . . . and of that part of such *business* which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, *such Federal regula-*

[1] Pennsylvania Gas Co. v. Public Service Commission, 252 U. S. 23.

[2] Public Utilities Commission v. Attleboro Steam & Electric Co., 273 U. S. 83.

tion, however, to extend only to those matters which are not subject to regulation by the States." (Italics supplied.)

It is conceded that Jersey Central, as respects generation and sale of the energy in question, and as respects also its security issues, was, at the date of adoption of the federal Act, and still is, subject to regulation under the law of New Jersey and that law does regulate those matters.[3]

The nature of Jersey Central's dealing with Public Service certainly does not fairly fall within the scope of the statutory description of the "business" of transmitting and selling electric energy in interstate commerce. But, out of abundance of caution, Congress added that the federal regulation should extend only to those matters which are not subject to regulation by the States. Language could not be plainer, nor more clearly exclude the present case. Congress desired to fill the gap left by the inability of the states to regulate certain forms of interstate transmission and sale. Congress made clear that it intended to go no further. The opinion of the court ignores this fundamental declaration of purpose and policy and reads as an independent mandate *in vacuo* the words of subsection (e). This I think is not a fair construction.

Subsection (b) provides: "The provisions of this Part shall apply to the *transmission* of electric energy in interstate commerce and to the *sale* of electric energy at wholesale *in interstate commerce, but shall not apply to any other sale of electric energy.*" (Italics supplied.) Here again Congress is at pains to restrict the federal regulation to a commercial transaction in interstate commerce to which the company to be regulated is a party.

The electric current which sometimes reaches Staten Island is, no doubt, "propelled" in some measure by Jersey Central's dynamos, but whether the current shall go to Staten Island or be used within the State is a matter wholly beyond Jersey Central's control in point either of law or of fact. Public Service may or may not choose to transmit and sell the energy interstate as a part of the interstate business which is subject to regulation by the Commission. The current flows beyond the State line only because Public Service maintains wires for that purpose and turns the current into them. What § 201 authorizes the Commission to regulate is "that part of such business which consists of the

[3] N. J. Rev. Stats., 1937, Title 48, chaps. 1 to 3; N. J. Stats. Ann. 48: 1-1 to 48:3-20.

transmission of electric energy in interstate commerce." Jersey Central is not engaged in the business of transmitting electric energy beyond the point of connection with Public Service's system, certainly not beyond the bus bar where Public Service alone determines its destination. Nor is Jersey Central engaged in interstate commerce because, after the current reaches the bus bar of Public Service, that company diverts it to Staten Island.

The construction now given to the Act makes the Commission's power to regulate Jersey Central depend, not on the nature of its own business, as § 201 (a) and (b) plainly require, but on the interstate character of the business of Public Service, over which Jersey Central has no control and which is subject to regulation by the Commission. § 201 (b) and (e). I can find no support in the language, history or avowed purposes of the Act for such a construction. Moreover, it is in flat contradiction to the words of § 201 (a), (b), and (e), which, when read together, explicitly exclude from the jurisdiction of the Commission a "person" who "owns or operates facilities" otherwise subject to the jurisdiction of the Commission by providing, in § 201 (a), that the federal regulation is "to extend only to those matters which are not subject to regulation by the States." Jersey Central is engaged in generating electricity which it sells and delivers to Public Service, all within the State. When the present Act was adopted it was not doubted, and in the light of our decisions it could not be, that the seller's business was intrastate and subject to state regulation. The manufacture and sale of a product wholly within a state is not interstate commerce even though the product is destined by the buyer to be shipped out of the state in interstate commerce.[4] That this is equally the case where the product produced and sold within the state is gas or electricity is implicit in our decisions.[5] As will presently appear more in detail, while it was the purpose of Congress, in enacting the Federal Power Act to extend the national control over the interstate transmission and sale of electrical energy, which had been held to be beyond the control of the states, the purpose was equally to preserve unim-

[4] See Chassaniol v. Greenwood, 291 U. S. 584; Parker v. Brown, 317 U. S. 341, 360, 361, and cases cited.

[5] Union Dry Goods Co. v. Public Service Corporation, 248 U. S. 372; Public Utilities Commission v. Landon, 249 U. S. 236, 245; Pennsylvania Gas Co. v. Public Service Commission, 252 U. S. 23; Missouri v. Kansas Gas Co., 265 U. S. 298, 308; East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, 471; cf. Utah Power & Light Co. v. Pfost, 286 U. S. 165; Coverdale v. Pipe Line Co., 303 U. S. 604, 611.

paired the existing state power of regulation over intrastate production and sale. The provisions of § 201 to which I have referred were introduced into the legislation which became the Federal Power Act in the course of its progress through Congress with the repeatedly declared object of accomplishing that precise purpose.

I submit that to argue that, as Jersey Central's seven-eighths mile intrastate line which connects with the lines of its intrastate customer, Public Service, is a facility over which flows energy which sometimes ultimately finds its way from Public Service's system into New York, and, hence, a facility for transmission of electric energy interstate, ownership of which subjects the owner to the Commission's jurisdiction, is to tie together two phrases found in separate provisions of the Act and to ignore the statute's provisions viewed in their integrity and entirety. By this process any desired result may readily be reached.

I conclude that the provisions of § 203[6] relating to regulation of security issues should not be considered since § 201 wholly excludes Jersey Central from the scheme of control established by the Act. But if this conclusion were less obvious from the face of the Act, the legislative history is convincing.

When a proposed bill first came before a committee of the House of Representatives, the chairman of the Federal Power Commission, its sponsor, said:[7]

"The new title II of the act is designed to secure coordination on a regional scale of the Nation's power resources and to fill the gap in the present State regulation of electric utilities. *It is conceived entirely as a supplement to, and not a substitute for State regulation.*" (Italics supplied.)

Section 201(a) of the bill as presented granted the Commission control of the "production" of electric energy, and "over all facilities" for its transmission and sale in interstate commerce, "and over all facilities connected therewith as parts of a system of power transmission situated in more than one State." . . .

The National Association of Railroad and Utility Commissioners, while recognizing the need of federal legislation to fill the

[6] It is to be noted that, even if Jersey Central were a utility within the Act, the proviso in § 201(a) limits the jurisdiction of the commission under § 203 respecting the company's acquisition and disposition of facilities and issue of securities, just as it limits the commission's authority over other phases of the business, since these matters are subject to regulation, and are, in fact, regulated by New Jersey.

[7] Hearings on H. R. 5423 before House Committee on Interstate and Foreign Commerce, 74th Congress, 1st Session, p. 384.

utilities along interstate lines. . . . Under the decision of the Supreme Court of the United States in *Public Utilities Commission* v. *Attleboro Steam & E. Co.* (273 U. S. 83), the rates charged in interstate wholesale transmission may not be regulated by the States. Part II gives the Federal Power Commission jurisdiction to regulate these rates. A 'wholesale' transaction is defined to mean the sale of electric energy for resale and the Commission is given no jurisdiction over local rates even where the electric energy moves in interstate commerce.

"Part II gives control over security issues of interstate operating companies in cases where no State commission has control and over the consolidation, purchase, and sale of interstate operating properties. . . .

"*The bill takes no authority from State commissions* and contains provisions authorizing the Federal Commission to aid the State commissions in their efforts to ascertain and fix reasonable charges. . . . *Probably, no bill in recent years has so recognized the responsibilities of State regulatory commissions as does title II of this bill.*" (Italics supplied.)

In Conference Committee § 201 (a) (b) took its present form, which is the language of the House bill in all particulars here material. In the light of this history it is evident the Congress specifically refrained from the regulation of the business of any utility whose business transactions, especially as respects transmission and sale of energy, state authority could regulate. Such is the instant case.

Both the language of the Act and the legislative history show that Congress did not intend to regulate matters affecting commerce, as well as commerce itself. It is interesting to compare, in this connection, other statutes enacted by the same Congress. Three adopted in July and August 1935 covered activities "affecting" commerce;[12] three, including the Federal Power Act in question, adopted in August 1935 did not cover activities "affecting" commerce.[13] Thus the legislature's discriminating use of language argues strongly for denial of the jurisdiction the Commission asserts.

I think the judgment should be reversed.

The CHIEF JUSTICE and MR. JUSTICE FRANKFURTER concur in this opinion.

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[12] See National Labor Relations Act, § 2(7), 49 Stat. 449, 450, 29 U. S. C. § 152(7); Public Utility Holding Company Act, § 1(c), 49 Stat. 803, 804, 15 U. S. C. § 79(c); Bituminous Coal Conservation Act, § 1, 49 Stat. 991, 992.

[13] See Federal Power Act, § 201(b), 49 Stat. 838, 847, 16 U. S. C. § 824(b); Motor Carrier Act, § 202(b), 49 Stat. 543, 49 U. S. C. § 302(b); Federal Alcohol Administration Act, § 3, 49 Stat. 977, 978, 27 U. S. C. § 203.